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Supreme Court of Michigan.

IN THE MATTER OF JACOB SPANGLER.

One *Spangler* was properly enrolled among the militia, from whom a draft was to be made. By mistake the name was written *Spangle* on the ballot put into the box from which the quota for the county was to be drawn. This ballot being among those drawn, the Court were of opinion that the draft was not vitiated by the error in the name.

Where one person is held in custody by another, acting in the right of and under the authority of the General Government, or claiming in good faith and under color of such authority to be so acting, the State Courts have no jurisdiction to inquire into the validity of such authority, and to discharge the person so held from custody.

Where a draft was made under a law of Congress, but under the direction of the Governor of the State, and by Draft Commissioners appointed by him, it was held that the persons drafted and in custody of the Draft Commissioners, were held under national authority, and that the State Courts had no jurisdiction to inquire into the validity of the draft on *habeas corpus*.

Habeas corpus, directed to Randolph Strickland, Draft Commissioner of Clinton county. The facts of the case, as they appear by the return and the admissions of the parties, are concisely stated in the opinion of Justice CAMPBELL.

J. L. Chipman, for petitioner.

A. Russell, United States District Attorney, for respondent.

MARTIN, C. J.—Were it not for the importance of the jurisdictional question presented in this case, and the imperative necessity for its settlement at this time, I should content myself with deciding that upon the undisputed facts of this case, there is no error in the proceedings of the Draft Commissioner, and that Spangler must be redelivered to his custody. His name was fully given and properly spelled upon the enrollment, and the trifling mistake of dropping out a letter from his name upon the ballots, when the person was clearly designated, could not render the draft invalid.

But I am not willing to turn the case off upon this point. The

main and all important question is one of jurisdiction, and it is this which I shall consider. The solution of this question depends, in my view, entirely upon that of whether Spangler is held by the Draft Commissioner under Federal or State authority; for, if under the former, we have no jurisdiction, while if under the latter, we have.

I do not concede that the return of the Commissioner that he holds Spangler under or by virtue of the authority of the United States, is of itself sufficient to deprive us of jurisdiction to inquire into the *cause* of his detention—for this is a traversable fact; but I do concede, that if so held, we have no jurisdiction to inquire further as to the legality of such detention, but that the whole subject is exclusively within that of the Courts of the United States.

The first question therefore is, under what authority is he held?

The Constitution of the United States, Art. 1, Sect. 8, empowers Congress to raise and support armies, to provide for calling forth the militia to execute the laws of the Union, to suppress insurrection, and to repel invasion, and to provide for organizing, arming, and disciplining the same, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointments of the officers, and the authority of training the militia according to the discipline prescribed by Congress, and to make all laws which shall be necessary and proper for carrying such plans into execution.

The Constitution itself was framed and adopted for the purposes, among others, of insuring domestic tranquillity and promoting the general welfare of the people of the United States; and the power of regulating the militia, and of commanding its services in times of insurrection, are natural incidents to the duty of watching over the internal peace of the Union. (See *Federalist*, No. 29.) This whole power was conferred upon Congress, reserving only to the States the appointments of the officers, and the training of the militia according to the discipline prescribed by Congress. In the exercise of this power, Congress, by the Act of July 17th, 1862 (Ch. 201), enacted that the President should call forth the militia—if, by reason of defects in existing laws, or

in the execution of them, in the several States, or in any of them, it should be found necessary to provide for enrolling the militia, and otherwise putting the Act into execution—he was authorized in such case to make all necessary rules and regulations for such purpose—the power of calling forth the militia already being reposed in him by existing laws. By virtue of this authority, upon the 4th of August, 1862, the President ordered a draft of 300,000 militia, to be immediately called into the service of the United States, and directed the Secretary of War to assign the quotas to the States, and establish regulations for the draft, &c.

Such assignments were accordingly made, and upon the 9th of August orders were issued from the War Department requiring the Governors of the respective States to proceed forthwith to furnish their respective quotas, directing an enrollment to be made of all able-bodied citizens between the ages of eighteen and forty-five, and providing and ordering that where no provision was made by law in any State for carrying into effect the draft thereby ordered, or when such provisions were in any manner defective, the draft should be conducted in a manner specified in such order, one provision of which requires the Governor to appoint a Draft Commissioner for each county, fixing his compensation and giving minute directions to him as to the discharge of his duties. The Governor of this State, finding that an imperfect military census had been taken, and that there were defects in our State laws, that inequality would occur in their execution, observed, in ordering the draft in question, the law of Congress and the orders of the War Department, and did not proceed under the State law. In this he exercised an executive discretion, with which we cannot interfere, and which, I think, was wise and proper. As he was not executing the laws of Michigan, he was, of necessity, obeying the laws of Congress and the orders of the President. The Draft Commissioner appointed by him was consequently a Federal, and not a State officer, and the draft was made under Federal authority, and the relator is held as such. The only remaining question is that of the jurisdiction of this Court, and of State officers, to inquire into the regularity of the draft, in the legality of Spangler's de-

tention. Upon this question I think there can be no doubt that we have none. The Federal Government and the State Governments exist as independently as the governments of the several States. Each acting within its sphere is foreign to the other and independent, and this principle extends to the jurisdiction of the Courts of each. Except in the case of the appellate jurisdiction conferred upon the Supreme Court of the United States, the Courts have jurisdiction only commensurate with the law of the State or nation under which they severally exist. An abuse of the authority of the United States, although committed by a citizen of this State, is an offence (says Chancellor KENT) against the United States, and exclusively cognisable in their Courts. If this be so, the exercise of power under such authority is equally under such exclusive jurisdiction. The views of Chief Justice TANEY, in *Ableman vs. Booth*, 21 Howard 506, are so apposite and exhaustive of this subject, and meet so fully with my concurrence, that it is hardly possible for me to do more than to refer to them as containing the whole law upon the subject. Questions of this kind, as he says, must always depend upon the Constitution and laws of the United States, and not of a State. The Constitution was not framed merely to guard the States against danger from foreign nations, but mainly to secure union and harmony at home: for if this object could be attained, there would be but little danger from abroad; and to accomplish this purpose it was felt by the statesmen who framed the Constitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty which the States then possessed should be ceded to the General Government, and that in the sphere of action assigned to it, it should be supreme and strong enough to execute its own laws by its own tribunals, without interruption from a State or from State authorities.

The writ must be dismissed for want of jurisdiction.

CHRISTIANCY, J.—I concur with my brethren in the result at which they have arrived in this case; but as there is a difference in the mode of arriving at that result, it is proper that I should briefly indicate the grounds of my opinion.

Had the Commissioner sought to hold the prisoner under the State law authorizing a draft, there could be no doubt of the jurisdiction of this Court to issue this writ of *habeas corpus*, and to discharge the prisoner, at any time before he had been actually mustered into the service of the United States.

But the Draft Commissioner does not claim to detain the prisoner under the State law; and it is evident from the face of the paper set out in the returns, that no attempt was made to effect the draft under the State law.

The draft here in question was made solely under the authority of the Act of Congress of July 17th, 1862, and the order of the President made for the purpose of carrying this law into effect—the order of the Secretary of War being the order of the President, as clearly as if issued and signed by the President himself.

But it is objected that, in pursuance of the Act of Congress, the draft should have been had under the State law, which, for this purpose, had been recognised by the Act, except in cases where the President should first decide with special reference to this State, that the State laws were defective, or defectively executed, and should therefore issue his orders, specially applicable to this State, prescribing the manner in which the enlistments should be made and the Act carried into effect—that he had no right to issue the general order stated in this return, leaving it to the Executive of the respective States to determine the question.

The Act of Congress of July 17th, 1862 (Sect. 1), does not declare by whom this question is to be determined, but merely that, “If, by reason of defects in existing laws, or in the execution of them in the several States, or any of them, it shall be found necessary,” &c., the President is authorized to make such rules and regulations. The power is made contingent only upon the fact of such a condition of the State laws, or of their execution—not upon the determination of the question by any particular person or officer. And I can see no reason why the President may not act, when this fact is found by the Governor of a State, upon whom the call is made for men, as well as if found by the President. The Governors of the States must be much more intimately

acquainted with the character of the State laws, and the difficulties and defects in their execution; and practically, it seems to me, the question must, as a general rule, be left to the determination of the State Executive, except in those States where either the State authorities or the people are supposed to be disloyal to the Federal Government. Should the Governor inform the President that the laws of his state were so defective, or defectively executed, that he could not furnish the requisite number of men in due season under them, it could hardly be expected that the President would overrule his decision. Or take the reverse of the case here given, and suppose the Governor to have decided that the laws of his State are neither defective nor defectively executed, and that he so informs the President, could it be expected that the President would disregard this decision or opinion of the Governor, and proceed to require the draft to be made under the Act of Congress and his own Executive order, without reference to the State law? Should the President thus Act, we should doubtless have more complaints than we have yet heard of his exercise of arbitrary power, and certainly with more reason.

Hence I am satisfied that though the President may decide upon this question of the defective condition or execution of the State laws, in States which are in insurrection or more or less affected by the rebellion, or where there is good reason to apprehend disloyalty on the part of the State Executive, yet he may, if he see fit, and should, in other cases, leave this question to be decided by the State Executive. Hence, I think the President was fully justified in issuing the general order, attached to the return regulating the enrollment and draft in all cases where laws of the State are defective or defectively executed, leaving it to the State Executive to determine the question: and when so determined by the State Executive, that determination, as in the present case, is equally valid and effectual as if made by the President himself. The effect, therefore, of the President's order and the proclamation of the Governor, his appointment of Draft Commissioners, and of the action of such Commissioners, are, I think, the same as if all these proceedings for the enrollment and draft

had been especially and directly prescribed by the Act of Congress.

The Draft Commissioner appointed by the Governor must, I think, be considered as acting for, and exercising the authority of, the Federal Government, and as a Federal officer for the performance of these duties, as much as if he had been directly appointed by the President. The men to be raised by the draft were to be raised for the Federal and not for the State service. The whole proceeding was an exertion of Federal and not State authority, for the purpose of selecting the men who were to be called into service, and, so far as the relator is concerned, for the purpose of bringing him into the service of the United States. The error in copying the name did not, I think, affect the validity of the proceedings, as the identity of the person intended was clearly ascertained. The proceedings were, I think, valid, and imposed upon the relator the duty of entering the service, and authorized the Commissioner to hold him for that purpose. If, therefore, the State judiciary have jurisdiction to determine the questions arising under the present writ, the relator should, I think, be remanded to the custody of the Commissioner.

But should these views be erroneous, still I think, beyond all controversy, there is enough appearing in the case to show that the Commissioner in good faith claims to hold the relator under Federal authority; that this authority is not set up as a mere pretext, but that the Commissioner and the authorities under whom he acts are honestly endeavoring to carry into effect the requirements of an Act of Congress and the Federal Executive in a matter vital to the safety of the nation. The question, therefore, of the authority of the Commissioner to hold this prisoner for the purpose stated, is one which I think appropriately belongs to the Federal and not the State judiciary. Upon this point of the jurisdiction, as applied to the facts of the present case, I concur with the Chief Justice and my brother MANNING.

In either view of the case, therefore, the prisoner cannot be discharged by this Court.

CAMPBELL, J.—Under the Act of Congress of July 17th, 1862,

the Governor of Michigan was called upon, through the War Department, to furnish troops for the service of the United States, to a specified number. The requisition from the Secretary of War set forth certain measures, which he was recommended to adopt, in case the State laws had not adequately provided for the emergency. The principal one of these suggestions, which becomes important in this case, was that commissioners should be appointed by him, to take charge of the drafting, where that should be resorted to, and see that it was properly carried out. The relator was enrolled, and, not having made out any claim to exemption or disability, his name was attempted to be copied from the list on a slip of paper, with the other names, and the slip placed in the box and drawn out. Upon this slip the name was written "*Spangle*," instead of "*Spangler*." No other person of the same name or any similar name resided in the drafting district, and his name was properly spelled on the list from which the slip was copied. He failed to appear when warned, and was arrested; and now claims to be discharged, on the ground that the proceedings to draft him have been had by the State authorities, in disregard of State laws, and that they cannot be justified under any other.

The question of misnomer is not one which can be conclusive in such a case. If the relator's name had not been properly enrolled, it would have been open to more doubt perhaps; but how far the mistake would have vitiated the draft is not material in this case. But here the person was not only identified clearly, but all the steps necessary, previous to the placing the slip in the box, were regular. This slip was copied from the correct list, and the omission was a clerical error, which, under the facts, could not possibly have caused confusion. The slip drawn was the one which had been placed in the box to represent him, and I think did represent him when drawn. The law does not require the name itself to be put in the box. The number corresponding to it is equally available; and all that can be required, as it seems to me, is that the slip drawn should appear, beyond doubt, to represent the person properly named in the roll from which it is copied.

The question, then, which it becomes necessary to determine, is whether he is lawfully held by the authorities of the State of Michigan. And as the course of the argument has necessarily involved an inquiry into the source and extent of the authority of the various public officials who have had charge of the raising of troops, and questions of jurisdiction have become involved among others, it seems unavoidable that the subject, from its present importance, should receive more extended notice than might suffice in ordinary cases.

No question arises here concerning any forces except those which are technically and legally called the *Militia*, as in no other cases is the drafting system applied through the State authorities.

Congress has power, under Art. 1, Sect. 8, of the Constitution, "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;" and also "to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of officers, and the authority of training the militia according to the discipline prescribed by Congress."

By Sect. 2 of Art. 2, it is provided that "the President shall be Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the service of the United States."

Even without the aid of the uniform practical construction which is to be found in the legislation of Congress, from the organization of the Government, there could be no difficulty in coming to a conclusion on some, at least, of the most important questions attending the establishment and use of the militia force, which we are now called upon to consider.

In the first place, it has been understood that Congress may and should determine the classes of persons from whom the militia should be filled up, either entirely or so far as it can be done without injuring the necessary organizations of the General and State Governments. This it has done by declaring, in general terms, that it shall be composed of all the free able-bodied white male

citizens of the respective States, resident therein, of the age of eighteen years and under the age of forty-five years, except such persons as are, by the Acts of Congress, or by the State laws, expressly exempted: 1 U. S. Stat. 271. Congress having declared of whom the militia shall consist, may provide, and has in a general way provided, for organizing, arming, and disciplining them. But Congress, as we have seen, cannot *govern* them, except when employed in the service of the United States; and they can only be called into the service of the United States when they are wanted for active duty, in protecting or vindicating the authority of the Government against actual or expected resistance. In time of peace (which may be fairly expected to be our ordinary condition), Congress has, then, no direct agency in managing the militia; and although it may prescribe how they are to be organized, equipped, and disciplined, yet the actual *government* is to be exercised by the States. All the machinery is, therefore, in ordinary times, in the hands of the States. That the requirements of Congress are as binding on them as on individuals, is unquestionably true. The question is not whether they can omit lawfully the duties enjoined upon them. The only question which concerns us, in the present inquiry, is whether, in performing these duties, they act as mere agents and ministers of Congress, or whether they act as communities, recognised by the Constitution, and owing the performance of these particular functions to the mandates of the Constitution, as directed especially to themselves. The language of that instrument, when it gives Congress power to govern the militia when called into service, shows that their government at other times is not by Congress. In other words, while they are sometimes governed by the State, and sometimes by Congress, they are never governed by both at the same time; and the governing action, therefore, cannot be a mere agency on either side. Nor is the President Commander-in-Chief of the militia not called into service.

This doctrine has always been recognised as applicable to the militia system by the Acts of Congress, which refer the whole work of organization to the State laws and authorities. And no one, in time of peace, or in time of war, would hesitate in declaring that,

when not in Government service, the militia are under State authority. Assuming that the Courts of the Union will not interfere with parties in State custody or control, nor the State Courts with those under the control or custody of the United States, we are to inquire whether, in the present instance, the relator is in custody of the United States or of the authorities of Michigan. The answer to this inquiry may properly determine how far we ought to proceed in the investigation of the facts before us. The question does not introduce any antagonism of jurisdiction, for all of these matters are undoubtedly regulated by the Constitution, in order to promote the efficiency of the militia to secure the safety and protection of the entire country; and the functions thus separately vested are so separated, because the separation was regarded as desirable, to secure economy of general expenditure, and to save the multiplication of offices, and the other familiar difficulties which have been so happily avoided by our composite system. By leaving each branch of jurisdiction where it belongs, we are only obeying a rule which is addressed to both alike, by the same authority which is our supreme guide in legal action.

The Constitution contemplates that every available man in the country may be required by Congress to be included in the militia—subject to such exceptions as they may allow, or as the nature of our institutions may require. We must also assume that it contemplates that, whenever required, some means must exist by which their services may be obtained. Congress may provide for calling out the troops, but the orders must necessarily emanate from the Commander-in-Chief, under whose control the troops in service must be held. The Act of 1862 (in substantial conformity in this regard with former laws) authorizes the President of the United States to call forth the militia, for such period, not exceeding nine months, as he may appoint, and declares that the militia so called shall be mustered in and continue to serve for the term specified, unless discharged by the order of the President. This law, like all the other statutes, distinguishes between the calling forth and the mustering in, and makes the mustering in the commencement of service. This is in strict accordance with the decision in *Houston*

vs. *Moore*, 5 Wh. 1, and *Martin* vs. *Mott*, 12 Id. 19, in both of which cases it was held that the militia did not cease to be State troops until received into the actual service of the United States.

The case would have raised no difficulty, had it not been for some further provisions in the Act of Congress, which are supposed to have introduced a more direct agency of the Union authorities into the work of getting the forces in the field. The Act provides that "if by reason of defects in existing laws, or in the execution of them, in the several States, or any of them, it shall be found necessary to provide for enrolling the militia and otherwise putting this Act into execution, the President is authorized in such cases to make all necessary rules and regulations," &c. And, in pursuance of this Act, the Secretary of War issued a request to the Governor of Michigan to furnish the quota of this State, suggesting at the same time the propriety—in case the existing State laws had not made adequate provision for the emergency—that Commissioners should be appointed to superintend the drafting operations, and making some further recommendations. These recommendations were accepted by the Governor, and issued in the form of general orders. It is claimed that this action was an assent on his part to waive his official authority as Executive of Michigan, and to perform duties as an agent of the War Department; and it is claimed, on the other hand, that he was acting as Governor, and that his action was void, because not had under any law which he could, as Governor, carry out; on the ground that he must carry out the State laws, if any. And these objections on the one hand to the jurisdiction of this Court, and on the other to the legality of the Governor's action, are somewhat closely connected.

It was claimed, on the argument, that any regulations in aid of the defects of existing laws, or their execution, must be made by the President; and that these regulations emanate not from him, but from the Secretary of War, and are therefore invalid. This objection is not maintainable. The Secretary of War is in this respect nothing more than the channel of Executive action; and it is well settled that his action is to be regarded as the action of the President, at least until disapproved. The President is not obliged

to leave his more important duties to attend to official details; and the action of his secretaries must be presumed to have been directed or approved by him, so as to make it his own: *Wilcox vs. Jackson*, 13 Pet. 498; *United States vs. Eliason*, 16 Id. 291; *Williams vs. United States*, 1 How. 290; *Parker vs. United States*, 1 Pet. 293. Nor can the fact that instead of adopting regulations by Act of Congress to supply deficiencies, the President was authorized to adopt these regulations, change the relation of the State to the Union authorities, where the State authorities are called upon to act. There is nothing in the Constitution which requires Congress to adopt such specific regulations in regard to the performance of the duty of calling out the militia. That duty must be performed by the Executive authorities; and if the laws were entirely silent on the subject, the President, when authorized to call out the forces, must of necessity have power enough to provide methods and adopt regulations for enabling the men to be obtained. As supreme Executive of the nation, and as Commander-in-Chief of the forces called out, he has certainly been invested with all needful authority. It would be absurd to suppose that when he is empowered to determine, without appeal, and absolutely, the existence of a state of things which justifies military interference, and is also empowered to call out the forces and suppress resistance to the Government, he is powerless, after exercising these high prerogatives, to direct how to carry out his own lawful orders, unless every one else shall have performed the duties devolving upon them. Public emergencies like those contemplated in the Constitution do not admit of delay, and require broad discretionary powers in all matters of detail; and Congress, in leaving these matters to his discretion, not only vested in him no strange or unusual powers, but acted wisely. The defects in different parts of the country could not be supposed to be the same. The State laws differ, and in some places more complete preparation had been made than elsewhere. In some places, where troops might be legally called for, the ordinary local action was not to be looked for at all, by reason of the pressure of rebellion. Uniformity of action, therefore, could not be expected, and the matter was properly left to the discretion of the President,

which, when exercised in such matters, must be respected: *United States vs. Eliason*, 16 Pet. 291; *Martin vs. Mott*, 12 Wh. 19; *Luther vs. Borden*, 7 How. 1; *People vs. Lewis*, 7 J. 73; *Lackington vs. Smith*, Pet. C. C. R. 466; *Vanderheyden vs. Young*, 11 J. 150. It is one of the fundamental rules of construction, that, when duties are imposed upon an executive officer of the Government, and he is confined to no specific method of carrying them out, he may select such means as are reasonable and proper, at his option.

So far as the State of Michigan is concerned, the President has not found it necessary to do anything more than make the proper requisition on the Governor, leaving him to carry it into effect by the State laws, if under them provisions had already been adequately made to furnish the troops, and if not, by other means—suggesting as appropriate in such case the steps actually taken. That these suggestions or requests are equally valid with a positive order, there can be no question. The requisition for troops is such an order, whether made in one shape or another: *Martin vs. Mott*, 12 Wh. 19. Although as an executive head of a State, there may be no process of compulsion directly against a Governor (as decided in *Commonwealth of Kentucky vs. Denison*, *Governor of Ohio*, 24 How. 66), yet he would be guilty of a gross violation of duty were he to disregard such a requirement; and the call must then be carried out through other channels. But this immunity from ordinary process has led with manifest propriety to the use, in intercourse between public officials, of the courtesy common between nations, of resorting to requests instead of peremptory demands—a courtesy which the authorities of this State have fairly deserved. But it is made a question whether the Governor can lawfully exercise such a discretion as is here left to him, of determining whether resort is necessary to any new mode of action.

To determine this we must first look to see precisely the nature of the discretion so remitted to him. It does not involve merely the question whether the State laws have made adequate provision for answering the call of the President. The act of Congress contemplates that there may be adequate laws inadequately carried

out. The first question is to some extent one of law, and yet not entirely, because the adequacy of the laws may depend somewhat upon the nature of the emergency. The second question is one involving considerations of mixed law and fact, peculiarly proper for executive consideration, and as plainly proper to be determined by the local Executive, who alone can have complete access to the necessary information. When he, as the organ of the State, is called upon to furnish troops, he is necessarily required to come to a conclusion whether those troops are attainable by ordinary means, and at once. If not, the call of the government must be disregarded, or resort must be had to other necessary and proper means. But to disregard the call, would be to violate the Constitution of the United States, which gives Congress an absolute right to authorize the President to make the call. In Michigan, the Governor is made by the Constitution itself, "Commander-in-Chief of the military and naval forces, and may call out such forces to execute the laws, to suppress insurrections and to repel invasions." He, therefore, is vested with such discretionary powers as are vested anywhere; and, as in the case of the President, he must have sufficient power to carry out any duty imposed upon him by the Constitution or the laws. In military emergencies he has the combined powers of a civil executive and a military Commander-in-Chief, subject, of course, to any constitutional restrictions, but subject to nothing which will prevent his obeying the Constitution. What might be the consequence of a needless resort to any but the regular and ordinary machinery of arriving at a lawfully prescribed result, when such machinery exists, is only to be regarded when such violation of duty appears. The orders of the President do not contemplate any needless resort to discretionary means, and it is not to be presumed that such a resort has been had without necessity. But it is proper to examine the State law of 1862 with reference to the variations from it which have occurred.

The law provides how an enrollment shall be made, but expressly authorizes the Governor to cause the lists to be made by any other person when deemed necessary for the public safety. L. 1862, p. 22. Of this necessity the Governor is sole judge. In obtaining

from each county the necessary number, the Governor is directed to notify the sheriff of the number required, and thereupon the sheriff is required to notify the county clerk or his deputy ; and, together, they are to copy from the lists, and put in a box, all the names on these lists, and draw them as jurors are drawn ; and the persons so drawn *and liable to do military duty*, shall be determined to be legally held to serve. In drawing jurors, if a person drawn is known to one of the attendant officers to be dead, or insane, or to have permanently removed from the county, another may be drawn in his stead. 2 C. L. 1191, § 4363. If the sheriff and clerk have a similar power in drafting, they have no further power. The only preliminary method of establishing exemptions, provided for by the statute of 1862, is by application to the assessors, at the annual review of the assessment rolls. L. 1862, p. 47. The officers are required to note as exempt, at that time, all who are actually exempt by law, whether claiming exemption or not. But the law does not give them final and conclusive powers in the matter ; and if the lists are made out otherwise than by them, it gives them no power at all. It is manifest that if the draft is made by the sheriff and clerk under this statute, the number actually drawn may be materially diminished, not only by exemptions but by personal disabilities, unknown or arising after the annual review. The law of Congress contemplates that, when the States are called upon to furnish troops, they shall furnish able-bodied soldiers ; and although possibly some latitude is necessary in doing this, yet some means of securing in advance, as near as may be, the selection of men who may be lawfully held to service, must be regarded as very desirable, if not absolutely necessary. The appointment of these Commissioners, in accordance with the President's suggestion, to conduct the draft, by making it, or causing it to be made, in what is certainly a substantial compliance with all the safeguards of the statute, furnished a method of securing, with considerable accuracy, against drafting exempts, or persons physically unfit for service. In this matter the Governor has adhered as closely to the law as was possible ; and has carried out its design by supplying its manifest deficiencies. So far as the arrest is concerned, the law is lit-

erally complied with, for it contemplates that other proper officers than the sheriff may have custody of the delinquent ; and where the person is not to be mustered in within the county, the sheriff has no power, under his mere *official* authority, to go beyond his own bailiwick. It is evident that the law can only be carried out by some discretionary agency, under the control of the Governor. But, even if the law in this respect were complete in its details, it permits a discharge by the sheriff—on payment of a penalty, which is not recognised by the Act of Congress, and which, if allowed, would prevent the Governor from furnishing the State quota, insomuch as no draft is provided for in lieu of the person commuting. The Governor has not, in my judgment, gone beyond the fair exercise of a legal discretion ; and it is unnecessary, therefore, to consider how far this Court could, if it were not so, review his conduct.

I am opinion that the relator is lawfully detained by the Draft Commissioner, under the military authority of the State of Michigan ; and that he should remain at the disposal of that officer, as lawfully drafted for service.

Writ dismissed for want of jurisdiction.

MANNING, J., delivered an able opinion concurring for reasons similar to those assigned by the Chief Justice. We are compelled to omit it on account of the length of the case.

Supreme Court of the United States.—December Term, 1862.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* THE BANK OF COMMERCE, PLAINTIFFS IN ERROR, *vs.* THE COMMISSIONERS OF TAXES AND ASSESSMENTS FOR THE CITY AND COUNTY OF NEW YORK.

The stock of the United States is not subject to State taxation. The case of *Weston vs. City Council of Charleston*, 2 Peters 449, commented upon and followed.

In error to the Supreme Court of the State of New York.